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January 19, 2006

**VIA ELECTRONIC FILING**

The Honorable Joseph J. Farnan, Jr.  
United States District Court  
District of Delaware  
844 King Street  
Wilmington, DE 19801

**Re: *Affymetrix, Inc. v. Illumina, Inc.*, D. Del., C.A. No. 04-901-JJF**

Your Honor:

Further to our letter of January 18, 2006, this letter provides Illumina's response to Affymetrix' January 17 letter that submits for the Court's review forty (40) examples from Illumina's privilege log.

Affymetrix' letter is an attempt to end run the procedure outlined by Your Honor at the hearing last week. In the paragraphs below, Illumina will review the history of this issue. In the end, however, the important point is that Illumina submitted a revised privilege log yesterday that addresses all of the issues raised by Affymetrix, as suggested by the Court last week and just as it promised Affymetrix it would do. Illumina's revised log (attached as Exhibit A) resolves any issues Affymetrix might raise.<sup>1</sup>

To the extent it is important, the relevant history is this. As a result of the expansive discovery that Affymetrix has sought in this case, Illumina has produced over 640,000 pages of documents and privilege logs that contain hundreds of entries. Not surprising given this voluminous discovery, and despite Illumina's best efforts to the contrary, Affymetrix has raised certain concerns with respect to Illumina's production, just as Illumina has raised concerns with respect to Affymetrix' production. On December 20, 2005, over two months after Illumina

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<sup>1</sup> Affymetrix' rush to raise these issues with the Court is particularly remarkable given that Affymetrix served its initial log months after Illumina did, and actually served a new log *yesterday* with a whole new series of entries. Furthermore, Illumina has numerous concerns with Affymetrix' privilege log, which it is attempting to resolve with Affymetrix without seeking the Court's intervention.

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produced its initial privilege log, Affymetrix identified specific concerns regarding it. On January 11, 2006, to address those concerns, Illumina produced a supplemental privilege log.

At the hearing last week, Affymetrix stated it believed Illumina's supplemental privilege log to be deficient in certain respects, without providing specific identification of all of the entries it thought to be deficient. Following some discussion of this issue, Your Honor stated:

THE COURT: Well, here's what we're going to do. You [Illumina counsel] look at it on behalf of Illumina, and make sure that you're confident with the logging. And then tell them that we're confident of what's here, and what documents are represented that deserve redaction.

And then you [Affymetrix counsel] can select -- you're talking about 400. You can select ten percent of that at random, 40. And I'll look at them.

And if I catch them improperly redacting on even one document, I'll order a broad remedy.

(Jan. 12 Hearing Tr. 44:14-45:2)

Illumina took the Court's instructions very seriously. Although Illumina did not understand Your Honor to have set a deadline for reviewing and confirming the logging, Illumina's counsel worked through the holiday weekend to review each and every one of 113 privilege log entries about which Affymetrix had specifically complained as well as the entirety of its supplemental privilege log. On Monday, January 16, 2006, Illumina sent Affymetrix a letter that comprehensively addressed the issues that Affymetrix had raised regarding Illumina's privilege log. (Ex. B) The letter also promised that Illumina would send a revised version of its supplemental privilege log to Affymetrix on Wednesday, January 18. Despite Illumina's attempts to timely address the issues in the manner it understood the Court to direct, Affymetrix nonetheless submitted a list of 40 complaints to the Court on January 17.

Upon reviewing Affymetrix' list of 40 pages (fewer than 40 documents because some pages are taken from the same document), Illumina has determined that 36 of these are documents about which Affymetrix has not previously complained. This is inconsistent with Affymetrix' position regarding Illumina's ability to complain about Affymetrix' privilege log, with Affymetrix contending that Illumina must meet and confer before raising such complaints with the Court. Nonetheless, these and, indeed, all of the entries in its supplemental privilege log have been addressed by Illumina in its comprehensive review of its privilege positions undertaken at this Court's direction.

As indicated in our letter of yesterday afternoon, we believe that Affymetrix jumped the gun in submitting the 40 examples that it provided to the Court with its January 17 letter. Illumina was following the Court's guidance and had informed Affymetrix that it was reviewing

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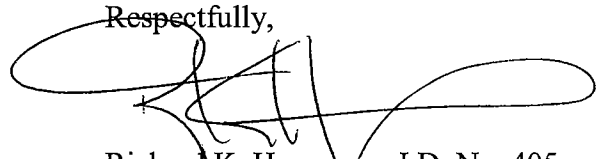
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its positions and preparing a revised supplemental privilege log. Illumina is willing to permit Affymetrix to submit 40 new examples, or to proceed on the examples already submitted. Illumina provides the following information in the event the Court elects to proceed with the examples submitted on January 17.

Illumina has attached hereto as Ex. C a table constructed for the Court's convenience.<sup>2</sup> This table extracts Illumina's position regarding the forty "examples" from the explanation and supplemental log provided to Affymetrix. For several examples, Illumina has re-reviewed them as directed by the Court and agreed to provide an unredacted version to Affymetrix. For the remaining examples, Illumina has, along with the other documents listed in its revised supplemental privilege log, confirmed the privileged nature of the examples and has attempted to address Affymetrix' concerns with more detailed log descriptions.

Illumina believes that its confirmation of privilege and more detailed descriptions support its claims of privilege and resolve any concerns Affymetrix can reasonably raise. Illumina, of course, stands ready to provide for *in camera* review any documents that Your Honor would like to review before resolving Affymetrix' challenge to Illumina's privilege claim.

Respectfully,



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cc: Dr. Peter T. Dalleo, Clerk of the Court (via electronic filing)  
MaryEllen Noreika, Esq. (via electronic filing)  
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<sup>2</sup> In a letter filed with the Court yesterday, Affymetrix requested a black-lined version of Illumina's revised log comparing it to its prior log. The image format of the logs, however, makes it extraordinarily burdensome if not technically impossible to generate a black-lined version.